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No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the petitioner's lobbying a model code organization can be held an actionable restraint of trade leading to treble damages under the Sherman Act, consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and its progeny.

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As Amicus Curiae, the State of Illinois respectfully prays this Court grant the petition for a writ of certiorari submitted by the petitioner in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 817 F.2d 938 (1987). The oral opinion of the District Court is not reported. Both opinions are found in the Petition for a Writ of Certiorari, Appendices A and B.

IDENTITY AND INTEREST OF THE AMICUS

The State of Illinois respectfully submits this brief, as amicus curiae, in support of granting the writ of certiorari in this case. The Attorney General of Illinois is the chief law enforcement officer of the state. He is charged with the duty to enforce the state's antitrust laws, as well as the federal antitrust laws. Illinois has a significant interest in the correct interpretation and application by the lower federal courts of this Court's antitrust doctrine.

The Second Circuit's opinion below threatens to undermine the system by which states such as Illinois promulgate legislation in the areas of product safety and building construction. The opinion will make it more difficult for the states to fulfill their responsibilities to protect their citizens from unsafe products and from hazardous construction. As the question presented is of such practical significance to state government and its citizens, and as the decision's adverse impact on state regulatory interests is of such magnitude, Illinois respectfully requests this Court grant the petition for certiorari.

STATEMENT OF THE CASE

This case arises from the petitioner's efforts to block the respondent's proposal to include a new type of electrical conduit, known as PVC conduit, as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC).

The NEC is a model code promulgated by the National Fire Protection Association (NFPA), which establishes products and performance requirements for electrical systems. The NEC is the most widely disseminated and adopted model code in the world. Forty-five states, including the District of Columbia, rely on the NEC in promulgating their electrical codes.

The NFPA is a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government. It revises the NEC every three years through a multi-step, several year long process. The NFPA submits proposed amendments to the NEC to a code-making panel made up of professionals with technical expertise in the area. If approved by this panel, the proposal then goes to the full membership, together with the comments and voting position of each panel member. After an opportunity for comment, the panel considers the amendment a second time along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

On September 18, 1978, the respondent began the process of obtaining NEC approval for its product, PVC conduit, by submitting its proposal to the NFPA.

The petitioner recognized that inclusion of PVC conduit in the NEC might adversely affect its sales of a competing type of steel conduit. It therefore met with a number of different groups, including other members of the steel industry, to gather votes in opposition to the respondent's proposal. The petitioner's lobbying tactics were aggressive, and included an NFPA membership and registration drive of its supporters, in an effort to "stack" the NFPA vote. When a vote was ultimately taken on the respondent's proposal, the proposal was rejected. Thereafter, various state legislatures enacted the NEC, and PVC conduit was not listed as a permissible construction material.

With its PVC product effectively excluded from the market, the respondent sued the petitioners for a violation of the Sherman Act in connection with its conduct before the NFPA. The jury found for the respondent and awarded it $3.8 million, to be trebled, plus attorneys' fees. The District Court granted the petitioner's motion to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under this Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. The Court of Appeals reversed and reinstated the jury verdict.

REASONS FOR GRANTING THE WRIT

The states have a responsibility to adopt laws, rules and regulations protecting the safety and welfare of their citizens. In exercising their regulatory and police power functions, states depend upon model codes such as the National Electric Code ("NEC") at issue in this case. Illinois requires compliance with the NEC in all cities, towns and communities except those which by ordinance have adopted comparable provisions. See, 41 Ill. Admin. Code, Part 100, Secs. 100.10, 100.210. Illinois has specifically delegated the power to establish building codes to local governmental units. See, Ill. Rev. Stats., ch. 24, par. 11-30-4 and ch. 34, par. 422. It is estimated that over fifty percent of all Illinois municipalities have adopted the NEC.

The decision below threatens to undermine the system of government reliance on model codes by denying concerned parties, which raise significant public safety issues before model code-making bodies, protection from treble damage liability under the Sherman Act as required by this Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr* and in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court developed the principle that the First Amendment right to petition the legislature outweighs antitrust concerns which arise when commercial competitors seek anticompetitive legislation. The opinion below disregards this principle. It will effectively chill the debate and hence will diminish the quality of the model codes considered by state and local government.

In addition to frustrating the states' ability to promulgate health and safety codes, and being inconsistent with this Court's decision in *Noerr*, the decision is in conflict with every other decision squarely treating the same issues.

1. The States Rely On Model Codes Such As The NEC.

In highly technical and complex areas, for example, safety codes and building regulations, state and local governments rely heavily upon a variety of model codes and other standards developed by voluntary organizations like the National Fire Protection Association ("NFPA"). *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329 (1978). State governments themselves lack the governmental resources to initiate, develop through public proceedings, adopt and defend comprehensive codes.

Development of such complex codes requires public hearings, which usually involve technical, scientific data and issues. Hearings are frequently time consuming, particularly when controversial matters may result in judicial challenges to adopted regulations. Furthermore, airing of the technical issues requires expert staff to conduct the hearings, analyze the evidence, weigh the sometimes conflicting data, prepare the appropriate code language and disseminate adequate information to those affected by the regulations in order to secure compliance.

As a practical matter most state and local governments lack the necessary resources to conduct their own investigations. For that reason and because the NFPA and other groups do a professional job in their own right, state legislatures depend on the NFPA and like code-making

associations to become, in effect, their committees and scientific laboratories. *See* Hamilton, *supra*, at 1377-78. From the state's perspective, code-making at the voluntary organization level is an integral part of its own legislative process. The model codes are the product of considered analysis and debate.

The NEC serves to illustrate how important model codes are to the states. Forty-five states, including the District of Columbia, rely on the NEC in promulgating their electrical codes. Aff. of John Lison, May 16, 1985, Joint Appendix, 137, 145 as submitted in the case below. Twenty-six states adopt the NEC in its entirety by reference. *Id.*_ *See, e.g.*, 41 Ill. Admin. Code Part 100, Sec. 100.210; 1981 N.Y Laws Chap. 707; Md. Ann. Code art. 38a, § 60; Colo. Rev. Stat. § 12-23-104(a). Another nineteen adopt it with amendments, usually modest ones. *Id. See, e.g.*, Cal. Admin. Code Tit. 24, R.3; 527 Code of Mass. Regs. 12.00; N.J. Admin. Code, Tit. 5, § 23; Wash. Admin. Code R. 296-46, R. 296-401. *See also* 29 C.F.R. § 1910.66(c)(22)(i) (1986); 33 C.F.R. § 183.435(a)(1) (1986) (federal regulations incorporating model codes by reference). Voluntary organizations perform an invaluable public service and save state and local governments precious legislative resources in developing model codes for government consideration. *See* House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong. 2d Sess. 3, 75 (1968).

2. The Decision Below Will Stifle The Uninhibited Debate The Model Code Process Requires.

It is in the best interest of state and local governments that organizations such as the NFPA have access to a free flow of information, and conduct robust and vigor-

ous debate when creating model codes. The exchange of ideas—even "wrong" ones—is the crucible which shapes the final legislative product as it emerges from the model code-making group's processes. Often, a party in the best position to raise concerns about the safety of a product is a competitor. *See, e.g., Noerr*, 365 U.S. at 136-137. Challenges, such as those made by Allied against Carlon's PVC conduit on safety grounds, are precisely the sort of catalyst for investigation upon which the code-making process, and in turn the states, depend.

The imposition of antitrust liability in the circumstances of this case will inhibit free and open debate within model code organizations by those parties most capable and motivated to bring all the facts to the fore. Allied raised the issue of the safety of PVC conduit before the NFPA. While clearly Allied was motivated in part by commercial interest, the jury found as a matter of fact that Allied was also motivated by a genuine concern for safety. Furthermore, the objective validity of the safety issue raised by Allied was conceded at the trial by Carlon. If Allied's conduct is not protected, few will ever be safe. Parties simply will not risk antitrust litigation to oppose a competitor's product, even with strong arguments based upon bona fide, scientific evidence that a particular product is unsafe or otherwise hazardous.

The decision below thus goes to the very heart of model code-making and threatens to destroy the model code process. It will become a sham, with critics of a product afraid to speak up for fear of exposure to antitrust claims. Nor is it an answer that participants may move to the legislatures directly with their challenges. The legislatures are ill-equipped to assume the task of initiating and developing complex codes from scratch in technical areas without the assistance of model codes. See pages 3-4, *supra*. Taking over these functions would require staff increases at a time when most budgets are under considerable pressure. That simply will not happen.

Besides the practical difficulty of state governments conducting hearings or revising technical codes, the Second Circuit's opinion may bring other more far-reaching problems. As code-making breaks down, the relative uniformity of product safety legislation in the building area will tend to diminish. The result is likely to be unseemly and dangerous competition for building activity based upon how lax a code a local area is willing to accept in order to induce the work.

On the other hand, the additional burden of having to develop complex legislation without the benefit of prior code-making will tend to cause local governmental units to be more reticent about changing and updating codes to accommodate new products or necessary changes. Paradoxically, a Court of Appeals decision that ostensibly is intended to enhance competition may well do the exact opposite, in the long run perpetuating and entrenching existing products.

3. The Second Circuit Took An Erroneous View Of The Protection *Noerr* Accords To Those Participating In The Legislative Process Through Model Code-Making.

In *Noerr*, the Supreme Court recognized the critical importance of excluding from Sherman Act liability the activities of competitors seeking to influence the legislature. The right of petition is so precious and the benefits to the legislature of having input from all sources is so great, that parties seeking to participate in the process must not be shackled with treble-damage liability. As the Supreme Court stated:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

365 U.S. at 137.

Even more fundamentally, the Supreme Court based its exemption from Sherman Act liability of those seeking legislative change upon the First Amendment rights of petition and association:

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1971) (application of the Sherman Act to petitioners of agencies and courts destructive of rights of association and petition). The Supreme Court has often recognized the exceeding importance of the First Amendment values of petition and association, and has frequently emphasized the exacting level of judicial review required of any legislation or lower court action which would impinge upon these rights, particularly as they relate to our democratic system.

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981). The Sherman Act must not be turned into a weapon to inhibit groups or individuals from presenting the legislature with information relevant to its making a decision.

The Second Circuit in the decision below paid verbal obeisance to these principles, but went on to eviscerate them. The Court ruled that competitors bringing information before model code-making bodies exert only an "indirect" influence on the legislature, and therefore are not protected by the *Noerr* doctrine. Virtually ignoring the reality of the relationship between the states and model code-making bodies, the court found that Allied's conduct did not constitute petitioning of the government, and that there are effective methods for influencing state governments directly, rather than through the model code-making bodies.

From the state perspective of model codes as an integral part of the legislative process, the Second Circuit's distinction between "direct" and "indirect" pressure on the legislature is misconceived. Concerned parties attempting to influence model codes are participating directly in the legislative process. This is precisely the sort of political activity, implicating fundamental First Amendment concerns, which the Supreme Court ruled is entitled to protection from the application of the antitrust laws. As the Supreme Court stated in *Noerr*:

> The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136.

Indeed, the Court in *Noerr* extended protection to far more "indirect" lobbying activity than exists in this case. There, the defendant railroad associations engaged in a deceptive publicity campaign designed to destroy competitor truckers' good-will and to promote support for legislation inhibiting the truckers' ability to compete. *Id.* at 129-30. This activity was only indirectly aimed at the Congress. But the activities of concerned parties petitioning for change in model codes are, in every practical sense, aimed at the state and local legislatures which may adopt them.

Besides being unrealistic, the Second Circuit's opinion does violence to the First Amendment principles underlying *Noerr*. The opinion below insists that competitors may effectively lobby the state legislature directly. But as has been stated above, the states simply lack the resources adequately to consider all the various issues raised in the area of technical code-making. While states obviously can adopt, amend or reject the model codes promulgated by the code-making associations, as a practical matter they rely heavily upon the expertise of the code-making bodies themselves, and on a free flow of information being presented to them.

By inhibiting the free flow of information at the model code-making level, the Second Circuit's opinion effectively limits the information which will be received by the legislatures directly. The decision will effect the very evils that *Noerr* was intended to protect against: denying legislative access and the right of association to those with the most to say, and denying the legislature the benefit of the information and ideas that flow from the model-code process.

4. The Four District Courts To Have Considered These Issues Recognized The Reality Of State Government Reliance On Model Codes.

All four district courts to have considered these issues have concluded that petitioning model code associations is protected by the *Noerr* doctrine. In *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Cas. (CCH) ¶66,989 (C.D. Cal. 1986), a company manufacturing fuel tank liners sued a company making fuel tanks, arguing that defendant Joor Manufacturing had undertaken a false information campaign to convince model code-making bodies to disallow tank liners. The association in this case was the Western Fire Chiefs Association, WFCA, which passes a uniform fire code, just as the NFPA passes the NEC. Also at issue was the defendant's influence in persuading Underwriters Laboratories ("U.L."), another model code organization, not to certify the safety of tank liners. The Court found that the challenged activity was protected under the *Noerr* doctrine because,

> [s]uch reliance upon the WFCA and UL by these governmental authorities in practical effect has resulted in a delegation of governmental authority to these otherwise private entities.
>
> . . . [A]s a practical matter, it would be virtually impossible for Joor to lobby the individual governmental entities regarding the adoption of particular specifications or requirements in the UFC. These governmental bodies rely on the WFCA and UL and in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL.

Id. at 62,066.

Similarly, in *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983), Allied Tube, the appellant in this case, sued Wheeling-Pittsburgh over Wheeling-Pittsburgh's attempt to lobby the NFPA to disapprove in the NEC a new type of conduit produced by Allied. The Court correctly recognized two key points. First, it noted the delegation of authority from state governments to model code groups:

> Such wholehearted reliance upon the NFPA and UL by these governmental entities has resulted in a near complete delegation of governmental authority to these otherwise private entities. While the governmental bodies of course have retained the power to modify or reject the NFPA and UL recommendations, in practice they have relied completely on them.

Id. at 838.

Second, the Court recognized the consequent difficulty of petitioning state government directly:

> as a practical matter it would be virtually impossible for WP to lobby the individual municipalities and states regarding the adoption of particular specifications or requirements for IMC. These governmental bodies have placed total trust and reliance on NFPA and UL. In order to influence effectively the governmental entities, WP had no option but to lobby NFPA and UL.

Id. at 838. *See also Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81 Civ. 6250 (S.D.N.Y. June 27, 1986) (Dist Ct. Opinion below); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

The State of Illinois wishes to reiterate the point that is made clear in each of these district court cases, and a point which was disregarded by the Court of Appeals

in the case below. As a practical matter, those wishing to affect legislation in technical areas such as building codes, have no choice but to petition at the model code-making level. Such is the system of mutual dependence that has evolved between state and local governments and the model code-making associations. Without this system, these governments would not be able fully to consider the merits of technical legislation.

CONCLUSION

The potential elimination of strong advocates with both the resources and capability to pursue safety issues within the model code development process, is contrary to the public interest. The very reason state and local governments rely so heavily upon such model codes, namely to facilitate the states' exercise of their sovereign authority to exclude unsafe products from the market, will be undermined. The decision below may, therefore, result in the public's serving as the unwitting and unwilling testing laboratory for unsafe products.

In its decision, The Second Circuit Court of Appeals placed major burdens upon the states, in regulating complicated scientific and technical areas, such as that regulated by the NEC. As this decision is contrary to the decisions of four previous District Courts, and as the question presented is of great practical significance to state and

local governments, the State of Illinois respectfully requests this Court to grant the petition for certiorari.

Respectfully submitted,

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